

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ORDER
05-CR-360-A

DAVID CAIN, JR.,

Defendant.

The defendant, David Cain, Jr., and his counsel have each filed motions pursuant to Fed. R. Crim. P. 6(e) on behalf of defendant Cain seeking to obtain and to use transcripts of proceedings subject to grand jury secrecy. The United States does not oppose the motion, subject to certain conditions. For the following reasons, and subject to the conditions that are ordered below, the Court grants the motion.

The transcripts of proceedings on September 11, 2006, and September 14, 2006, that defendant Cain seeks are not of grand jury testimony but are of proceedings before the Court that concerned whether the defendant's trial counsel, Mr. Angelo Musitano, would be compelled to testify before the Grand Jury under subpoena regarding matters that would preclude Mr. Musitano from continuing to represent defendant Cain in this case.

Defendant Cain needs to present copies of the transcripts and related argument to the Second Circuit Court of Appeals in connection with a request to the Court of Appeals to rehear the defendant's direct appeal and, potentially, in support of a petition for certiorari to the U.S. Supreme Court. The need for continuing secrecy of the Grand Jury proceedings before the Court on or about September 11, 2006, and September 14, 2006 (the "transcripts"), is greatly diminished and the defendant's need for the transcripts to pursue appeal of whether he was improperly denied his counsel of choice outweighs the need for continuing secrecy. The transcripts shall be provided to the defendant with the following conditions:

1. One copy of each of the transcripts shall be provided to the defendant, David Cain, Jr., and one copy shall be provided to his counsel, Charles F. Willson;
2. Copies of the transcripts may be made and provided under seal to the Court of Appeals for the Second Circuit and the U.S. Supreme Court, but no other copies may be made;
3. Neither defendant Cain nor his counsel, Mr. Willson, shall otherwise disclose the transcripts or the contents of the transcripts to other persons, except that Mr. Willson may disclose them to his staff in connection with their filing under seal with the Court of Appeals for the Second Circuit and the U.S. Supreme Court;

4. Upon conclusion of defendant Cain's direct appeal, all copies of the transcripts shall be returned to the United States Attorney's Office for the Western District of New York.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: August 6, 2012